Supreme Court, U.S.
FILED

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No. 02-_____

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN DIGRADO,
Petitioner

V.

JOHN ASHCROFT,
Respondent

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF HABEAS CORPUS

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HBP

QUESTION PRESENTED

Whether, a former legal permanent resident, who has been impermissibly deported and excluded from the United States without being considered for 212(c) relief, in direct contravention of INS v. St. Cyr, 533 U.S. 289 (2000), remains "in custody" by virtue of his exclusion from the United States, for purposes of filing a petition under 28 U.S.C. § 2241 to seek review of the prior erroneous order of deportation?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the Petitioner, the United States of America by and through its Attorney General, and the Director of the Immigration and Naturalization Service.

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Steven Digrado respectfully petitions for a Writ of Habeas Corpus for release from custody and detention pursuant to 28 U.S.C. §2241.

OPINION BELOW

The opinion below was entered by the Second Circuit Court of Appeals on April 17, 2003 under the caption, Steven Digrado v. John Ashcroft, Case No. 02-2120. A copy of the Order and Opinion of the Second Circuit is attached hereto as Exhibit A-1.

JURISDICTION

This Court has original jurisdiction over the Petitioner and his claim pursuant to 28 U.S.C. §2241, and Article III, Section 2 of the United States Constitution.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Article I, Section 9

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

28 U.S.C. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless–

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under

any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for

the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination..

STATEMENT OF THE CASE

The Petitioner and his family immigrated to this country in 1996, when the Petitioner was only 7 years old. Until his prior conviction, the Petitioner was at all times a permanent legal resident.

On May 29, 1983, the Petitioner married Dulce Martinez, a United States Citizen. The couple lived in Rahway, New Jersey and had two U.S. citizen children. During this

time, the Petitioner worked in various construction businesses.

On June 7, 1993, at the age of 34, and in the midst of significant financial difficulties, the Petitioner became involved with Angel Esparra. The Petitioner's involvement with Mr. Esparra ultimately led to the Petitioner's arrest for possession of heroin.

Pursuant to the terms of a plea agreement, the Petitioner pled guilty to a one count criminal information, charging the Petitioner with possession with the intent to distribute 500 grams of Heroin, in violation of 21 U.S.C. § 841(a)(1). The Petitioner entered his plea on September 13, 1993.

The Petitioner received a sentence of 60 months incarceration and began serving this sentence on January 18, 1994. On May 4, 1998, the Petitioner was released from the custody of the Bureau of Prisons, after having served 52 months incarceration. An INS detainer was lodged against the Petitioner, and he was released on bond, pending resolution of his INS status.

On November 12, 1998 the Petitioner was ordered deported by the immigration judge. This ruling was upheld by BIA on May 21, 1999.

Following his removal to Italy, the Petitioner eventually attempted to return to this Country. On May 1, 2001, the Petitioner presented himself at the United States Border and presented an expired Green Card. The Petitioner properly identified himself and was therefore detained by INS for attempting to illegally re-enter the country.

PROCEDURAL HISTORY

The Petitioner was indicted in the Northern District of New York, in case No. 1:01-Cr-330-1 for attempting to unlawfully enter the United States. The criminal proceedings in this matter have been held in abeyance by the District Court pending resolution of this appeal.

On August 30, 2001, the Petitioner filed his initial motion pursuant to 28 U.S.C. § 2241 seeking to vacate his prior order of deportation. The United States filed timely response on and motion to dismiss on November 26, 2001.

The lower court entered an order denying the Appellant's petition on February 11, 2002. (Appendix - A-2) A timely Notice of Appeal was then filed on February 15, 2002.

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question regarding the rights of individuals unlawfully deported between the enactment of the IIRIRA and the issuance of this Courts opinion in INS v. St. Cyr, 533 U.S. 289 (2000). During this brief period, hundreds of legal permanent residents, and other non-citizens, many of whom had convictions that were many years old, were rounded up by the INS, deprived of any consideration for waivers from deportation under INA § 212(c), and summarily deported.

These individuals have, or had, families, careers and children left behind in this Country. Under the reasoning of the INS, these individuals who are no longer in the United States, but whom we know were impermissibly deprived of consideration of §212(c) at the time of their deportation hearing

due to the ex post facto imposition of the IIRIRA, have no legal recourse to seek to re-open their order of deportation. This large and distinct group, who suffered incredible prejudice at the hands of the INS, under a law that was subsequently declared by this Court to be an unconstitutional violation of the ex post facto clause, have no legal remedy to address those wrongs, or correct the errors made, if this Court accepts the reasoning of the Second Circuit.

This Court has a duty to those who were removed improperly under the auspices of the IIRIRA. This Court corrected what was the impermissible retroactive application of provisions of the IIRIRA, which mandated any non-citizen convicted of an aggravated felony could not receive consideration of waiver from deportation under INA § 212(c). In St. Cyr, *supra,* this Court found that numerous individuals had entered into plea agreements with the specific belief, that upon completion of their sentence they would be entitled to consideration for this discretionary relief. No other remedy exists for this class of individuals removed after the IIRIRA and before the decision in St. Cyr. Navarro-Mirand v. Ashcroft, 330 F.3d 672 (5th Cir. 2003).

Yet, when this Court stopped the ex post facto application of the IIRIRA to §212(c), hundreds of individuals had already been removed from their homes and families. Those individuals, excluded from the United States, but no longer in direct physical custody, are left with no remedy, no right to return to the United States and no process by which to reopen their prior deportation. This Court must now determine the fate of those individuals and their families.

ARGUMENT

THE APPELLANT CAN BE CONSIDERED TO BE IN INS CUSTODY FOR PURPOSES OF JURISDICTION UNDER 28 U.S.C. § 2241.

The issue not only for the Petitioner, but for hundreds, of deported former legal permanent residents, is whether, following deportation or removal pursuant to an unlawful order of deportation, do the federal district courts retain habeas corpus jurisdiction, to review the actions of the INS. Simply the answer is yes.

To get to that answer we have to review several facts. Was the prior order of deportation issued in violation of the statutes or constitution of the United States? Does the right to habeas corpus survive the enactment of AEDPA and IIRIRA? Finally, does the final order of deportation constitute a sufficient restriction on liberty to allow for a finding of "custody" in order to satisfy the jurisdictional requirements of 28 U.S.C. § 2241. Luckily for us, this Court has already answered these questions in the affirmative.

First, the Petitioners's prior order of deportation was clearly improperly entered. On June 25, 2001, the Supreme Court issued its opinion in INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Applying Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the Court first determined that Congress had not expressly prescribed that AEDPA and IIRIRA applies retrospectively. See 121 S.Ct. at 2289. Second, the Court concluded that applying AEDPA and IIRIRA to an alien convicted pursuant to a plea agreement entered into prior to AEDPA and IIRIRA's enactment would have an impermissible retroactive effect. See id. at 2291. "Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief. Because respondent, and other aliens

like him, almost certainly relied upon that likelihood in deciding whether to forego their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." Id. at 2293.

Now, the Petitioner contends, and St. Cyr, specifically finds, that at the time of his deportation, the Petitioner qualified for and should have been considered for § 212(c) relief. This fact has not been contested.(In St. Cyr, the United States Supreme Court recognized that 51.5% of the applications for § 212(c) relief were granted. St. Cyr at 2276, fn 5, citing 28 Miami Inter-Am. L.Rev. 123, 150, n.80.) The failure of the Immigration Judge and the INS, to consider the Petitioner for this relief was clearly improper in light of St. Cyr, thus the order of deportation must be vacated and this matter remanded to the immigration judge for proper review under the principles of §212(c).

We must now turn towards whether the availability of Habeas Corpus remains, after the imposition of the AEDPA and the IIRIRA. The District Court below clearly understood that habeas corpus relief remained. In its order, the lower court found that under St. Cyr, 28 U.S.C. § 2241 remains the proper vehicle to raise questions of law to challenge INS removal decisions. (Appendix, A-2) Numerous other courts have also followed this finding.

Lastly, then it must be decided whether the Petitioners can bring his questions of law, regarding his prior order of deportation, to the attention of the Courts via 28 U.S.C. § 2241. The sole remaining question as pointed out by the Respondent below, is whether the Petitioner is in INS "custody", a predicate for jurisdiction under 28 U.S.C. § 2241.

The district court below narrowly construed the term custody, and found that the Petitioners was not in the physical custody of INS and therefore, the Court could not exercise jurisdiction over the INS, the Attorney General, or the

immigration judge's order of removal. (Apx. A-2) The Second Circuit was even narrower in its view, finding that once the removal had been completed, no "custody" existed. (Apx. A-1) This view of custody, requiring in effect the physical restraint or incarceration of the Petitioner is too narrow and not supported by prior caselaw.

> The Tenth Circuit has recognized,
>
> "[o]ver the past thirty years, however, the custody concept in criminal cases has broadened considerably, and now includes many situations where the petitioner is not in actual physical custody. *See* Hensley v. Municipal Court, 411 U.S. 345, 350-53, 93 S.Ct. 1571, 1574-76, 36 L.Ed.2d 294. This change in philosophy has likewise applied to habeas actions arising from immigration cases. *See e.g.*, Salehi, 796 F.2d at 1289 n. 5 (custody requirement satisfied where aliens were released under court ordered injunction); Williams, 795 F.2d at 740-41, 744 and n. 3 (finding petitioner in custody where he was under final deportation order but obtained voluntary departure order); Marcello, 634 F.2d at 967 (final deportation order was sufficient to render alien in custody).
>
> Thus, there is general consensus that an alien whose liberty is restricted pursuant to an order emanating from the INS is "in custody" for purposes of satisfying the prerequisites for habeas review. *See generally* 3 Charles Gordon & Stanley Mailman, Immigration Law and Procedure § 81.04[1][b].

Galaviz-Medina v. Wooten, 27 F.3d 487, 493 (10th Cir. 1994)

Under this theory, it is the final order of deportation itself, that retains § 2241 jurisdiction. This only makes sense. If custody were to be so tightly construed, no alien would have recourse against the illegal or unconstitutional actions of the INS. The INS could order deported the entirety of any racial or ethnic group, then once that deportation is completed and the individuals are outside the country, they would have no recourse against the INS.

The Supreme Court has already recognized the inherent danger of this situation. In Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) the Court squarely and fully addressed the custody requirement of habeas corpus. The Court found:

> The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.
>
> In England, as in the United States, the chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement. For

example, the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will. The test used was simply whether she was 'at her liberty to go where she please(d).' So also, habeas corpus was used in 1763 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man 'for bad purposes.' Although the report indicates no restraint on the girl other than the covenants of the indenture, the King's Bench ordered that she 'be discharged from all restraint, and be at liberty to go where she will.' And more than a century ago an English court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were 'not under imprisonment, restraint, or duress of any kind.' These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679, 31 Car. II, c. 2--the forerunner of all habeas corpus acts--as permitting relief only to those in jail or like physical confinement.

Similarly, in the United States the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. This Court itself has repeatedly held that habeas corpus is available to an alien seeking entry into the United States, although in those cases each alien was free to go anywhere else in the world. '(H)is

> movements,' this Court said, 'are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion.' Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service. The restraint, of course, is clear in such cases, but it is far indeed from the kind of 'present physical custody' thought by the Court of Appeals to be required. Again, in the state courts, as in England, habeas corpus has been widely used by parents disputing over which is the fit and proper person to have custody of their child, one of which we had before us only a few weeks ago. History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.

Id. (Internal cites and footnotes omitted)

In Brownwell v. We Shung, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 252 (1956) this Court reviewed the remedies available to an alien excluded from the United States. Justice Clark writing for the Court found that, "exclusion ordered may be challenged either habeas corpus or by declaratory judgement." Id. At 184.

In United States v. Jung Ah Lung, 124 U.S. 621, 8 S.Ct. 663, 31 L.Ed. 591 (1888) a Chinese laborer who had

lost his certificate entitling him to reenter the United States and was being held in executive detention upon his return, successfully turned to the district court for a writ of habeas corpus. The government argued that under the Chinese Exclusion Acts, passed in the late nineteenth century, aliens excluded under the statute were not being deprived of liberty within the contemplation of the habeas statute. The Supreme Court responded:

> It is urged that the only restraint of the party was that he was not permitted to enter the United States. But we are of opinion that the case was a proper one for the issuing of the writ. The party was in custody. The return of the master was that he held him in custody by direction of the customs authorities of the port, under the provisions of the Chinese Restriction Act. That was an act of Congress. He was therefore in custody under or by color of the authority of the United States, within the meaning of [the Habeas Corpus Act].

Id. at 626, 8 S.Ct. 663.

Since 1888, then, aliens refused entry into the United States have been able to test the validity of that exclusion by habeas, even though that person is technically free to go anywhere in the world, save this country. See Nishimura v. United States, 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146 (1892) ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful."); Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953); see also James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, § 8.2(b) (1994) (outlining early cases allowing habeas corpus jurisdiction to continue even after the

petitioner's departure).

This understanding of the "custody" requirement in habeas corpus review gains further support in the case law analyzing "custody" for purposes of post- conviction habeas relief. The traditional strict custody requirement has been greatly expanded over the last several decades, as "stifling formalisms" and "arcane and scholastic procedural requirements" have given way. Hensley v. Municipal Court, 411 U.S. 345, 350, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) (holding that person released on his own recognizance pending execution of sentence is "in custody" within the meaning of 28 U.S.C. § 2241). "History, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world ... to support the issuance of habeas corpus." Jones v. Cunningham, 371 U.S. 236, 240-42, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) (paroled person is within "custody" of parole board for habeas purposes, because the control of that board "involves significant restraints on petitioner's liberty.").

Clearly, the Supreme Court has already contemplated the type of issue faced by those individuals wrongfully deported prior to St. Cyr. In no uncertain terms the United States Supreme Court has stated that "habeas corpus is available to an alien seeking entry into the United States..." Id. At 239-40. The simple act of excluding an alien, is a sufficient restriction on his liberty to qualify for habeas corpus jurisdiction.

Many Circuits have followed these holdings with the reasoning that the ten year ban on re-admission of a removed alien into the United States under 8 U.S.C. § 1182(a)(9)(A)(ii) is a sufficient collateral consequence to preserve a live controversy, and thus the custody requirement of §2241, even after deportation. Chong v. District Director,

INS, 264 F.3d 378 (3rd Cir. 2001); Max-George v. Reno, 205 F.3d 194 (5th Cir 2000); Smith v. Ashcroft, 295 F.3d 425 (4th Cir. 2002).

Oddly, the Second Circuit has held that the order of removal is not currently reinstated thus no custody. This argument is faiis when considered in light of the actual facts. First regardless of whether the prior order of removal is reinstated or not, Petitioner is banished from the United States. He cannot return due to the prior order. This banishment, or exclusion was accomplished via an unconstitutional law and must be remedied. Secondly, that the order of removal has not been reinstated, or that there exists no INS detainer at this time, is merely a strategic ploy of INS to defeat this Court's jurisdiction. We must play very dumb indeed to believe that the detainer and reinstatement of removal are not forthcoming the minute this litigation ends.

It is beyond argument that the Petitioner in this matter should be granted an opportunity to seek and be considered for § 212(c) relief. As such, the Petitioner would submit that this Court must grant the writ of habeas corpus, vacate the prior order of deportation, and remand this matter to the immigration courts. No other conclusion can be sustained under the law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Habeas Corpus should be granted. This Court must order the INS to re-open Petitioner's removal proceedings for consideration of 212(c) relief.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of April two thousand and three.

PRESENT:

HON. JOHN M. WALKER, JR.,
Chief Judge.
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
Circuit Judges.

STEVEN DIGRADO,
Petitioner-Appellant,

v.

JOHN ASHCROFT,
Respondent-Appellee.

SUMMARY ORDER
No. 02 2120

For Appellant: ROBERT A. RATLIFF, Mobile, Alabama.

For Appellee: BARBARA D. COTTRELL, Assistant United States Attorney *for* Joseph A. Pavone, United States Attorney, Northern District of New York (Sara M. Lord, Assistant United States Attorney, *on the brief*), Albany New York.

Appeal from the United States District Court for the Northern District of New York (Hurd, J.).

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the sentence of the district court is hereby AFFIRMED.

Petitioner Appellant, Steven DiGrado, appeals from the dismissal of a petition for habeas corpus he brought under 28 U.S.C. § 2241. DiGrado is currently in the custody of the United States Marshal's Service awaiting trial for reentering the United States – without first seeking the approval of the Attorney General – after having been deported pursuant to a final order of removal. *See* 8 U.S.C. § 132(a).

In the briefs and at oral argument many issues were raised. Among these are a) whether DiGrado's claims may only shield him from prosecution for illegal reentry if raised in a motion to dismiss the indictment or as a defense at trial pursuant to, and limited by, the requirements of 8 U.S.C. § 1326(d), and b) whether the district court erred in ruling, in the alternative, that DiGrado's

prior removal order constituted *res judicata*. *See Smith v. Yeager*, 393 U.S. 122, 124-25 (1968); *see also INS v. St. Cyr*, 533 U.S. 289 (2001).

We need not reach any of these matters. At oral argument, counsel for Appellant informed us that the INS has not lodged a detainer against him with the Marshal's Service. Furthermore, since Appellant's prior removal order has not been reinstated, *see* 8 U.S.C. § 1231(a)(5), he is not now under a final order of removal. There being nothing in the record clearly evidencing the intent of the INS to take custody of DiGrado after his criminal trial and possible incarceration, we find that DiGrado is not in the custody of the INS [illegible] meaning of 28 U.S.C. § 2241(e). *Cf. Frazier v. Wilkinson*, 842 F.2d 42, 45 (2d Cir. [illegible]. We need not decide whether the habeas statute could provide a basis for raising his claims against the INS; as the district court ruled, such relief is not in any event, available at this time.

We have considered all of Appellant's arguments and find them meritless. We therefore AFFIRM the order of the district court dismissing DiGrado's petition.

For the Court.
ROSEANN B. MacKECHNIE
Clerk of Court
by: Lucille Carr

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STEVEN DIGRADO, 9:01-CV-1359

Petitioner,

vs

JOHN ASHCROFT,
Attorney General; and
UNITED STATES
IMMIGRATION AND
NATURALIZATION
SERVICE,

Respondents.

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DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION and ORDER

(Filed Feb. 11, 2002)

I. Background

Petitioner Steven DiGrado ("petitioner" or "DiGrado") is a native and citizen of Italy who, at the age of seven, entered the United States as an immigrant with his parents in 1966. (*See* Pet. at ¶ 1.) DiGrado, who never applied for citizenship in this country, subsequently married and had two children. *Id.* at ¶¶ 1-2.

On June 23, 1993, DiGrado was arrested and thereafter charged with possessing with intent to distribute more than 500 grams of heroin. *Id.* at Ex. A. DiGrado pleaded guilty to this charge and was sentenced by the Hon. Maryanne Trump Barry, U.S. District Judge for the District of New Jersey, to a term of imprisonment of sixty months. *Id.* at Ex. C.

On February 26, 1998, the Immigration and Naturalization Service ("INS") issued a Notice to Appear that charged DiGrado with removability on the ground that the possession with intent to distribute heroin conviction constituted an aggravated felony which subjected DiGrado to deportation. (Resp't Mem. Supp. Dismiss at Ex. A.) On May 4, 1998, DiGrado, after having served his sentence on the drug conviction, was released from the custody of the Bureau of Prisons pending resolution of the issues relating to his deportability. (Pet. at ¶ 7.)

In November 1998, Immigration Judge Daniel A. Meisner ("Immigration Judge Meisner") held a hearing on the issue of whether DiGrado was to be deported. At this hearing, Immigration Judge Meisner found that DiGrado was not entitled to seek discretionary relief from deportation

under former Section 212(c) of the Immigration and Nationality Act ("INA"), and in his decision issued on November 12, 1998, ordered the removal of DiGrado from the United States. (Resp't Mem. Supp. Dismiss at Ex. B.) DiGrado appealed to the Board of Immigration Appeals ("BIA"). In its decision dated May 21, 1999, the BIA acknowledged that DiGrado had been a lengthy resident of the United States and was a parent of two children who are United States citizens. However, it found that Immigration Judge Meisner properly found that DiGrado did not qualify for any form of relief from removal, and the BIA therefore dismissed DiGrado's appeal. (Pet. at Ex. E.) DiGrado did not seek any review of the BIA's decision from the Third Circuit Court of Appeals[1] as is authorized under 8 U.S.C. § 1252. Additionally, DiGrado did not file a petition for a writ of habeas corpus following dismissal of his BIA appeal.

DiGrado was deported to Italy in September 1999. At the time of his removal, he was provided a notice that informed him that he was prohibited from entering or attempting to enter this country at any time due to his being convicted of an aggravated felony. This notice also advised DiGrado that once he was removed, he was required to obtain permission from the Attorney General authorizing any travel he wished to make to the United States. (Resp't Mem. Supp. Dismiss at Ex. D.)

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[1] Since DiGrado's removal hearing was held in New Jersey, which is within the Third Circuit, jurisdiction over any petition for review filed by DiGrado would have been in that Circuit. *See* 8 U.S.C. § 1252(b).

On May 1, 2001, DiGrado attempted to enter the United States as a passenger in an automobile being driven by his girlfriend. *Id.* at Ex. E. Border agents detained DiGrado after he presented an expired green card in support of his claim that he was entitled to enter the United States. *Id.* DiGrado was subsequently arrested and charged with illegally attempting to re-enter the country after his removal. *Id.; see* 8 U.S.C. § 1326.

DiGrado filed the present petition on August 30, 2001. Petitioner claims that he is entitled to habeas relief in light of the United States Supreme Court's decision in *INS v. St. Cyr*, ___ U.S. ___, 121 S. Ct. 2271 (2001).[2] Petitioner claims that he was wrongfully deported, because at that time he was eligible for discretionary relief under the now-repealed INA § 212(c).

Respondent Ashcroft filed a motion to dismiss the petition on November 26, 2001, to which petitioner filed a reply. In his reply, DiGrado argues that the motion to dismiss should be denied and all criminal proceedings involving him should be held in abeyance until a final

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[2] In *St. Cyr*, the Court held that Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (which expands the categories of criminal convictions that render an alien ineligible for discretionary relief under former Section 212(c) of the INA), and Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") (which repeals INA § 212(c)), do not apply retroactively to aliens who were placed in deportation proceedings after the AEDPA and IIRIRA became effective, but who pled guilty prior to the effective date of those statutes. *St. Cyr*, ___ U.S. ___ at ___, 121 S. Ct. at 2293. In the present case, it is undisputed that petitioner pled guilty to the underlying criminal offense prior to the enactment of the AEDPA and the IIRIRA, and therefore was eligible for § 212(c) discretionary relief from deportation. (*See* Pet. Ex. B.)

determination of his immigration status is made by the immigration courts.

II. Discussion

In support of his claim that he was wrongfully deported, petitioner contends that *St. Cyr* reveals that Immigration Judge Meisner erred in failing to consider at his deportation hearing whether he was entitled to a discretionary waiver of deportation based upon the factors enumerated in former INA § 212(c).

Respondent argues that jurisdiction to hear DiGrado's claims is lacking, and that, in any event, the petition is barred by the doctrine of res judicata.

A. Jurisdiction

1. Applicability of 8 U.S.C. § 1252(g)

Respondent argues that 8 U.S.C. § 1252(g) precludes judicial review of DiGrado's claims. Thus, a review of this statute is warranted.

Title 8 of the United States Code provides, in relevant part:

> 1252 *Judicial review of orders of removal*
>
> (g) Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Although at first blush this statute might appear to have far reaching implications as to the jurisdiction of federal courts to hear claims relating to immigration matters, the Supreme Court has read this provision narrowly, holding that it does not cover the "universe of deportation claims." *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 482 (1999) ("*AAADC*"). Instead, the Court held that this provision is relevant only as to the three discrete situations listed in the statute: (1) decisions to *commence* proceedings; (2) decisions to *adjudicate* cases; and (3) decisions to *execute* removal orders. *Id.* (emphasis in original).

Notwithstanding the express statements of the Supreme Court in *AAADC* concerning the scope of § 1252(g), respondent argues that the language of § 1252(g) not only prohibits judicial review of decisions to execute removal orders, but also as to all "subsequent attack[s] on final orders of removal that are executed." (Resp't Mem. Supp. Dismiss at 11.) In support of this interpretation, respondent cites *Foster v. Townsley,* 243 F.3d 210 (5th Cir. 2001).

The *Foster* Court, in discussing the substance of plaintiff's civil complaint, noted that:

> [t]he particular acts that form the basis of Foster's lawsuit arise from 'the officials' decision to execute his removal order. His claims of excessive force, denial of due process, denial of equal protection and retaliation are all directly connected to the execution of the deportation order. Therefore, their acts fall within the ambit of section 1252(g) and are precluded from judicial review.

Id. at 214-15. Thus, in sharp contrast to the present facts, the claims in *Foster* related directly to the manner in which

the removal order was executed, and the court's finding in *Foster* that the plaintiff's claims were jurisdictionally barred by § 1252(g) was entirely appropriate. The challenge by DiGrado does not relate, in any way, to the decision of the Attorney General to execute the final order of removal. As respondent notes throughout his papers in support of his motion to dismiss, the deportation order was executed in 1999. Thus, *Foster* provides no support for respondent's jurisdictional argument.

Instead, the facts of this case are more analogous to those found in *Morel v. Reno,* 98 F. Supp. 2d 1172 (D. Nev. 1999). In *Morel,* the petitioner challenged the determination of the Immigration Judge, affirmed by the BIA, that he could not apply for § 212(c) relief. The *Morel* Court noted that:

> The determination of ineligibility does not implicate any decision of the Attorney General to commence proceedings, adjudicate the case, or execute an order of deportation. Therefore, § 1252(g) does not operate to preclude jurisdiction over the present action.

Id. at 1178 (internal footnote omitted).

Thus, neither the text nor the United States Supreme Court's interpretation of § 1252(g) supports respondent's argument that jurisdiction is lacking to consider DiGrado's claims.

2. Custody Requirement of 28 U.S.C. § 2241

The respondent also argues that jurisdiction over the present action is lacking because DiGrado is currently in the custody of the United States Marshal's Service, and

not in the custody of the INS. Thus, he claims that this Court lacks personal jurisdiction over the respondents.

In *St. Cyr,* the Court held that 28 U.S.C. § 2241 remains a proper vehicle for entertaining challenges to INS removal decisions which raise questions of law. *St. Cyr,* 121 S. Ct. at 2278-87; *see also Lawrence v. INS,* No. 00 CIV 2154, 2001 WL 818141, at *2 (S.D.N.Y. July 20, 2001). However, *St. Cyr* did not consider the issue of whether a petitioner is presently in the custody of the Attorney General to meet the custody requirements of § 2241.

"Absent custody by the authority against whom relief is sought, jurisdiction usually will not lie to grant the requested writ." *Severino v. Thornburgh,* 778 F. Supp. 5, 6 (S.D.N.Y. 1991) (quoting *Campillo v. Sullivan,* 853 F.2d 593, 595 (8th Cir. 1988)). DiGrado must be in the custody of the INS to obtain the habeas relief he seeks. 28 U.S.C. § 2241(c); *Deutsch v. United States,* 943 F. Supp. 276, 278 (W.D.N.Y. 1996) ("[i]n order for this Court to have jurisdiction over [petitioner's] habeas claims, [he] must be in the custody of INS"); *Dearmas v. INS,* No. 92 Civ. 8615, 1993 WL 213031, at *3 (S.D.N.Y. June 15, 1993) (finding that lodging of an INS detainer does not place the prisoner in INS custody).

Although the INS has apparently lodged a detainer against DiGrado, doing so did not place DiGrado within the custody of the INS or provide habeas jurisdiction over the respondents. *Deutsch,* 943 F. Supp. at 278 ("[c]ourts in this Circuit uniformly have held that the mere filing of an INS detainer fails to satisfy the 'in custody' requirement for habeas corpus jurisdiction"); *Dearmas,* 1993 WL 213031, at *3.

In his reply, DiGrado argues that several courts have considered the merits of habeas applications filed in similar circumstances, and that, therefore, his petition should not be dismissed. However, all of the cases cited by DiGrado are readily distinguishable from the case at bar.

In *Halley v. Reno,* No. 99-CV-4710, 2001 WL 184571 (E.D.N.Y. Feb. 21, 2001), the respondents did not contest that petitioner was in INS custody. Rather, they argued that the INS District Director in Louisiana was sole custodian of petitioner, over whom the court lacked personal jurisdiction. *Id.* at *1. The court found that the Attorney General was the proper custodian, over whom the court had personal jurisdiction. *Id.*

Similarly, in *Mojica v. Reno,* 970 F. Supp. 130 (E.D.N.Y. 1997), at issue was identifying the proper custodian. The court considered that question after finding that both petitioners were clearly in the custody of the INS. *See id.* at 165-66.

Finally, in *Nwankwo v. Reno,* 828 F. Supp. 171 (E.D.N.Y. 1993), the respondent argued that the properly named custodian in a habeas petition must be "the jailer who has day-to-day control of the prisoner," rather than the Attorney General. *Id.* at 173. The Court noted that "[t]here are compelling reasons of policy why the Attorney General should not normally be regarded as the custodian of a habeas petitioner." *Id.* at 173-74. However, it ruled that the Attorney General could be named as the proper respondent due to the "extraordinary additional considerations" which existed in that particular case, including an "atypical and unanticipated volume of habeas corpus petitions . . . beyond the capability of the district court to process in a timely fashion." *Id.* at 174. In *Nwankwo* the

petitioner was released to INS custody after completing a sentence on federal drug charges. *Id.* at 172. He was incarcerated at the Federal Deportation Center at Oakdale, Louisiana, awaiting deportation proceedings. *Id.* Thus, there was no question that "[t]he Attorney General [was] plainly the legal custodian of the petitioner." *Id.* at 174.

The prevailing view in the federal courts, including all of the districts within this state that have considered this issue, is that a federal habeas petitioner raising a claim concerning the issue of deportability must be in the custody of the INS when the suit is commenced. *See, e.g., Deutsch,* 943 F. Supp. at 278 (W.D.N.Y.); *Severino,* 778 F. Supp. at 6 (S.D.N.Y.); *Wang v. Reno,* 862 F. Supp. 801, 813 (E.D.N.Y. 1994). DiGrado was arrested on federal criminal charges. He is currently in the custody of the United States Marshals Service, on bail, awaiting trial on those charges. He is not being held pursuant to an INS deportation order or pending deportation proceedings. Therefore, petitioner is not in the custody of the Attorney General or the INS, and jurisdiction is lacking pursuant to § 2241. *See, e.g., Deutsch,* 943 F. Supp. at 278 ("[b]ecause [petitioner] is not currently in INS custody, his claim for habeas corpus relief against the INS is dismissed for lack of jurisdiction"); *Thompson v. INS,* 941 F. Supp. 30, 32 (W.D.N.Y. 1996) (dismissing petition under § 2241 because petitioner was in custody of Bureau of Prisons and not the INS); *Severino,* 778 F. Supp. at 7 (declining to adopt Report-Recommendation of Magistrate Judge that found petitioner was in custody of INS in light of detainer lodged against petitioner; district court dismisses petition brought against Attorney General as custodian of petitioner); *Dearmas,* 1993 WL 213031, at *2.

The merits of respondent's res judicata argument provides an alternative grounds for dismissal, and therefore is discussed below.

B. Res Judicata

The respondent argues that the petition should also be dismissed because "[t]he doctrine of res judicata prevents DiGrado from relitigating his order of removal in this Court by way of habeas corpus." (Resp't Mem. Supp. Dismiss at 6.)

"'Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.'" *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979)); see *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259 (2d Cir. 2001). This doctrine applies with full force in the context of immigration proceedings. *Hibbert v. INS*, 554 F.2d 17, 20 (2d Cir. 1977) (finding deportation order res judicata); *Medina v. INS*, 993 F.2d 499, 503-04 (5th Cir. 1993) (finding that the "venerable legal canon" of res judicata applies to final, valid judgments of the BIA); *Ramon-Sepulveda v. INS*, 824 F.2d 749, 750 (9th Cir. 1987) (per curiam) (doctrine of res judicata applicable to findings of INS in deportation proceedings); *Spinella v. Esperdy*, 188 F. Supp. 535, 542 (S.D.N.Y. 1960) ("plaintiff, as heretofore indicated, has litigated the question of his prior deportation. . . . [T]he determinations in [prior courts concerning the issue of his deportability] are res judicata as to any issues raised here").

Although DiGrado is correct in contending that hindsight reveals that both Immigration Judge Meisner and the BIA, in light of *St. Cyr,* incorrectly retroactively applied certain provisions of the AEDPA and IIRIRA to his detriment this fact does not somehow render the doctrine of res judicata inapplicable in the present action. As the *Medina* Court noted in applying the doctrine of res judicata to the immigration case before it:

> res judicata precludes a second suit on the same issue between the same parties when there has been a valid and final judgment on that issue; and *it makes no difference that the final, valid judgment may have been based on an erroneous factual finding or an erroneous understanding of law, or both.* The only considerations for purposes of res judicata is [sic] whether the judgment was final and valid, and there was an opportunity to reach the merits. Here, these requirements were met.

993 F.2d at 504 (emphasis added).

The reasoning of *United States v. Hernandez-Rodriguez,* 170 F. Supp. 2d 700 (N.D. Tex. 2001) is persuasive in considering respondent's res judicata argument. In that case, the petitioner was admitted to the United States as a lawful and permanent resident in 1990. *Id.* at 701-02. In 1994 he was convicted of sexual assault. *Id.* at 702. This offense qualified petitioner as an "aggravated felon" for purposes of the immigration law. *Id.* Over petitioner's objection, the Immigration Judge retroactively applied the amendments to the immigration laws to petitioner's case and ordered him deported. *Id.* He was deported in 1999. *Id.*

In July 2001, petitioner re-entered the United States without obtaining the required consent of the Attorney General. *Id.* He was arrested and later indicted for the offense of illegal re-entry after deportation subsequent to a conviction for commission of an aggravated felony, in violation of 8 U.S.C. §§ 1326(a) and (b)(2). *Id.* The petitioner moved to dismiss the indictment in the criminal case, arguing, *inter alia,* that the 1999 deportation was invalid as a requisite element of the offense of illegal re-entry, because it was based on an improper retroactive application of IIRIRA and AEDPA in light of *St. Cyr. Id.* at 702-03. In denying the request to dismiss the indictment, that court held:

> Hernandez's sole allegation of fundamental unfairness [in the immigration hearings] is ... based on the fact that at a later date the Supreme Court agreed with [petitioner's argument that the amendments to the AEDPA and IIRIRA should not be retroactively applied to the petitioner] when advanced by another alien in another case. This establishes, however, only that [petitioner's] argument was substantively correct; it does not prove that, in considering and deciding [petitioner's case the immigration judge] committed any procedural errors rising to the level of due process violations and thus fundamental unfairness. *The court declines to hold that, because [the immigration judge] applied law that ultimately was deemed incorrect, the deportation proceeding was fundamentally unfair.*

Id. at 704 (emphasis added);[3] *see also Alvarenga-Villalobos v. Reno,* 133 F. Supp. 2d 1164, 1168-69 (N.D. Cal. 2000) (finding no due process violation where petitioner waived review in the earlier deportation proceeding), *aff'd,* 271 F.3d 1169 (9th Cir. 2001).

In the present case, although Immigration Judge Meisner's decision ultimately proved to be an incorrect application of the revisions to the immigration laws, this fact did not render his decision void or otherwise subject to relitigation. Since the issue of his deportability has already been fully and fairly litigated, the doctrine of res judicata precludes DiGrado from relitigating this claim in the present habeas corpus action.[4]

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[3] The *Hernandez-Rodriguez* court also noted that the government was correct in its contention that the new principle of law articulated in *St. Cyr* could not apply to cases disposed of at a prior time. *Id.* at 704 n. 2. Specifically, it held that because the petitioner's case was no longer open on direct review when the Supreme Court decided *St. Cyr,* petitioner could "not in effect reopen his prior civil case through a collateral attack on his deportation order in this criminal proceeding." *Id.* (citing *Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 97 (1993)).

[4] A collateral challenge to the validity of a deportation order, which is used to form an element of the criminal offense, may be made where the alien was denied any possibility of judicial review of the deportation order. *United States v. Fernandez-Antonia,* No. 01-1030, ___ F.3d ___, 2002 WL 124724, at *5 (2d Cir. Jan. 29, 2002) (citing *United States v. Mendoza-Lopez,* 481 U.S. 828, 838-39 (1987)). Any such challenge by DiGrado would be unavailing since judicial review of the BIA decision was available to him. He failed to pursue judicial review of his deportation order.

C. Reconsideration

Finally, DiGrado's petition must also be dismissed if viewed as one seeking to reopen or reconsider the BIA's finding regarding the issue of his deportability. The BIA may reopen or reconsider a decision it has rendered only prior to the alien's departure from the United States. 8 C.F.R. § 3.2(d). The INS regulations provide as follows:

> (d) Departure, deportation, or removal.
>
> A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

8 C.F.R. § 3.2(d). The Second Circuit has observed that this regulation "terminates an alien's ability to move to reconsider or reopen upon physical deportation." *Vargas v. INS,* 938 F.2d 358, 361 (2d Cir. 1991). Thus, because DiGrado was deported, he cannot properly request that the BIA reconsider or reopen its prior decision which found him subject to deportation.

III. CONCLUSION

Title 8, Section 1252(g) of the United States code does not preclude review of the merits of this habeas petition. DiGrado is not in the custody of the Attorney General or the INS; therefore jurisdiction is lacking pursuant to 28

U.S.C. § 2241. Petitioner's prior final deportation order, followed by his deportation, is res judicata of his immigration status at that time. Finally, the BIA cannot reconsider the final deportation order.

Accordingly, it is

ORDERED, that

1. Respondent's motion to dismiss is GRANTED and the petition is DISMISSED; and

2. Petitioner's request to hold all criminal proceedings involving him in abeyance until a final determination of his immigration status by the immigration courts is DENIED.

IT IS SO ORDERED.

/s/ David N. Hurd
United States District
Judge

Dated: February 8, 2002
Utica, New York.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A14 907 271 - Newark Date: May 21, 1999

In re: STEFANO *DI GRADO* a.k.a.
Steven DiGrado

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

ORDER:

PER CURIAM. The appeal is dismissed. The respondent has appealed from an Immigration Judge's November 12, 1998, decision finding him removable as charged under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1227(a)(2)(A)(iii), and ordering that he be removed to Italy. The Immigration Judge determined he was not qualified for any form of relief from removal. The respondent has appealed.

On appeal, the respondent challenges the Immigration and Naturalization Service's decision to place him in removal proceedings instead of issuing an Order to Show Cause at either the time of his criminal arrest or conviction. However, a decision by the Service to institute removal or other proceedings involves the exercise of

prosecutorial discretion and is not a decision that the Immigration Judge or this Board may review. *See Matter of G-N-C-*, Interim Decision 3366 (BIA 1998), and cases cited therein. We therefore find no merit to the respondent's argument that the Service should have instituted proceedings earlier so the respondent could have been placed in deportation proceedings.

Despite the sympathetic factors in the respondent's appeal, including his lengthy residence in the United States, marriage to a United States citizen, and as a parent of two United States citizen children, he has not demonstrated eligibility for any form of relief from removal. Accordingly, the appeal is dismissed.

/s/ [Illegible] W. Vacco
FOR THE BOARD